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     UNITED STATES DISTRICT COURT
     SOUTHERN DISTRICT OF NEW YORK
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     In re: FOREIGN EXCHANGE
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            BENCHMARK RATES
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             ANTITRUST LITIGATION
                                            13 Cv. 7789 (LGS)
5
                                             September 5, 2017
 6
                                             11:30 a.m.
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     Before:
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                         HON. LORNA G. SCHOFIELD
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                                             District Judge
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(Case called)

THE COURT: Good morning. You may be seated.

So we are here for a preliminary approval hearing for what is essentially phase two of the settlements in the Foreign Exchange cases, and the motions before me are for preliminary approval of five proposed settlements, conditional certification of two classes for settlement, appointment of class counsel for those settlement classes, appointment of plaintiffs as class representatives, appointment of Mr. Feinberg as the settlement administrator, appointment of Garden City Group as the claims administrator, approval of Huntington National Bank as escrow agent, and a stay of all proceedings with regard to the new settling defendants.

As I think everybody here knows, we are covering a lot of the same ground that we did in the original settlements.

I also know that the plan of distribution has been somewhat revised and the proposed notice has been somewhat revised, and there are motions for approval of those as well.

So let me leave those aside for just a moment.

Turning first to the proposed settlements and related motions, there is no opposition filed to any motion. As we all know, that is not necessarily unusual, particularly at the preliminary approval stage. And I see that there are five settling parties, for a total of approximately 111.2 million, and I had a few questions. And Mr. Burke is nodding his head

so perhaps that means he is going to speak.

So my first question is about the amounts of these individual five settlements, and I was wondering if you could put them in the context of the other settlements. You had said in your motion papers that the total amounts on average of the five are within the same range as the prior approved settlements based on approximately 17 million per point of global market share.

I looked at the other nine settlements, and I see that that's very close to the first two settlements, JP Morgan Chase and UBS, which were both a little bit exceptional because of varied circumstances, but the average per point for these five settlements is quite a bit lower than the 35 to 54 million per point for the other seven original settlements. So my question is, what makes that amount fair for these five?

MR. BURKE: Thank you, your Honor.

A couple of different reasons. The first of which is the reduced class period that plaintiffs could possibly recover from. The class period has been reduced now from December 1, 2007 through December 2013. The original class period went back to 2003.

The additional reasons are: Smaller market share piece. These particular entities were, in our estimation, and our economist's estimation, unable to as easily move the price for particular currency pairs as some of the banks with larger

market shares could.

Differences in liability. The relatively smaller amounts per market share reflect class counsel's view of the chat evidence, and we have over a million and a half documents, approximately 24 million pages. We have reviewed 1.7 million of them or 97 percent of the total. We have a good sense of what the chats look like. The evidence was not as strong for these particular defendants. To use kind of a well-worn phrase, they were not the ringleaders. And that's reflected in the fact that none of those banks were indicted or pled guilty to price-fixing. In fact, only two of the banks even had a regulatory production.

No traders were fired for bank conduct in these banks. We felt if we had to go forward, we could hold them in, but it would be a challenge to hold them in on a conspiracy.

Those are, in sum, the reasons that drove the numbers down for these particular settling defendants.

THE COURT: Thank you.

MR. BURKE: Your Honor, I don't mean to interrupt the flow, but we have some handouts that might assist the Court as well.

THE COURT: Relating to the settlements?

MR. BURKE: Related to the settlements.

THE COURT: If you have two copies, that would be

25 great.

Would you like to be heard with respect to your handouts?

MR. BURKE: Yes, your Honor.

What I have handed up to the Court is a grid or a scorecard listing the total settlements today alphabetically by defendant. We have highlighted the new settling defendants and the settling amounts and have given the grand total.

The next document reflects the --

THE COURT: Do you have these available on slides if you want to display them?

MR. BURKE: I don't have these on slides.

THE COURT: We do have an overhead projector if you're interested. But if not, that's fine.

MR. BURKE: I think we can talk through these.

THE COURT: OK.

MR. BURKE: The next document describes the settlement fund as a percentage of estimated damages, and this would be the total settlement fund.

This was a question the Court had during the first or during the prior preliminary approval hearing, how many cents on the dollar a class member is getting. And with the additional settlements for the entire class period, class members are now looking at 21 to 27 cents on the dollar. That's assuming a 100 percent claims rate.

If you were to use the take rate and the BARX Last

Look case, class members would be looking at 52-and-a-half cents to 67 cents on the dollar.

I think this is also an important comparison. If you looked only at the litigation period, which is December 1, 2007 through December 31, 2013, class members at 100 percent take rate would be getting 30 to 39 cents on the dollar. And using the 40 percent take rate of the *Last Look* case, you would be looking at 75 cents to 97.5 cents on the dollar.

THE COURT: Just say those last numbers again.

MR. BURKE: 75 cents to 97.5 cents on the dollar.

THE COURT: So that is all settlements together class-wide.

MR. BURKE: All settlements together class-wide.

THE COURT: Do you have the numbers for these five, either together or individually?

I mean, the problem is I am trying to assess these five settlements and their fairness. So while it is interesting to hear what the total return on the dollar would be for the class as a whole, it would also be helpful for me to hear those numbers for these settlements.

MR. BURKE: I didn't do the arithmetic, but I can do them quickly if you would like.

THE COURT: Sure. Or maybe you can have somebody else do the arithmetic while you're telling me about the plan of distribution.

MR. BURKE: The third handout would be the proposed timeline for the notice and claims process.

THE COURT: Is this the same as the timeline that you gave me with your papers?

MR. BURKE: The exact same one.

THE COURT: OK.

MR. BURKE: The final handout is the plan of distribution presentation.

THE COURT: So let me just ask a couple more questions about the settlement.

I didn't compare the releases word for word. Are they the same in these five settlements with each other and are they the same as the prior nine?

MR. BURKE: The releases are the same as the prior nine and the same with respect to each other.

THE COURT: All right.

So that's really all the questions I had with respect to the settlements. Thank you for addressing the issues that I had raised at the prior hearing, and I appreciate your anticipating that so we don't have to go back and forth.

I would like to turn now to the motion to approve the revised notice for all the settlements, meaning all 14. It looked to me like the proposed manner of notice was unchanged since my approval on December 20, 2016. And it looked like the changes to the form of the mail notice, the summary notice, and

the claim form are modest and sensible. Thank you very much for the red-line versions because otherwise I would not have been able to conclude that.

The one thing I would like to add is that since the notices are being translated into various languages, and now even now more languages, if you can file certifications by the translators of those notices by the notice date, and I will try to add that to my order.

MR. BURKE: We will do so.

THE COURT: OK.

So I will approve the revised form of notice and manner of notice.

So I would like to turn now to the motion to approve the revised plan of distribution. So if you would like to explain that, that would be great.

MR. BURKE: Your Honor, my partner, Kristen Anderson, has been the lawyer working most closely with the experts, and I think it's appropriate for her to present that.

THE COURT: Thank you.

You can pull the mic all the way up.

MS. ANDERSON: Thank you, your Honor. Good morning.

The plan of distribution is the same as the Court previously approved, but it takes into account some new information. And that new information includes the Court's September 20, 2016 opinion on the motion to dismiss, as well as

additional transaction data analysis, and continuing review of the discovery record, including review of the chat evidence.

So if we turn to slide 2, this discusses the claim form and the claimant options when they receive the claim form.

THE COURT: Could you just please keep your voice up a little bit.

MS. ANDERSON: Sure.

THE COURT: Thank you.

MR. BURKE: So when a class member receives their claim form, they are going to be presented with two options. And this is a little bit of a review from the last presentation, this part hasn't changed.

Option 1 allows the claimant to check a box and the claims administrator will calculate their claim amount based on the settling defendant's data. And under Option 2, the claimant has to submit their own transaction data to the claims administrator.

Now, whether a claimant submits Option 1 or Option 2, the same formula for the plan of distribution is applied. The only difference is the source of the data.

On the next slide --

THE COURT: Slide 3?

MS. ANDERSON: Slide 3.

On the next slide, this goes over the claimant options. Most claimants will have the choice between

submitting Option 1 and 2. There are two exceptions to that.

The first exception is for claimants who traded only with nonsettling defendants. In the far column on the right, you will see that they can submit Option 2 only. And that is because we don't have data in the claims database for the nonsettling defendants. And so if they traded exclusively with the nonsettling defendants, then --

THE COURT: How are they part of the settlement if they traded exclusively with the nonsettling defendants?

MS. ANDERSON: The settlement class consists of anyone who traded with any defendant; it's not just the settling defendants.

THE COURT: OK. So if there were more settling defendants, it would just increase the amount, it wouldn't change anybody's claim.

MS. ANDERSON: Correct.

THE COURT: OK. That's perhaps why Mr. Burke was giving me the numbers class-wide as well. Thank you.

MS. ANDERSON: The second exception is for claimants who are claiming on exchange traded FX instruments. Those types of trades are not in the claims database because the settling defendants are not a source of data for those trades because the trades are actually with an exchange. So if class members want to submit a claim for exchange trades, then they have to submit their own data or have to run the calculations

for that.

Then on the next slide, we are going to over the factors that are built into the plan of distribution formula. The formula takes into account and weighs five different factors.

THE COURT: And these are the same?

MS. ANDERSON: These are the same. The first four are the same and the fifth one is legal discounts.

So the five factors are notional volume, type of instrument, currency pair, trade size, and legal discounts.

So on the next slide, we are going to go through the notional volume and type of instrument traded.

So the first step in applying the plan of distribution formula is going to be using a combination of the notional volume of the trade and the type of instrument traded.

The claimants will have traded many different types of FX instruments throughout the class period. Most commonly, spot, forwards, swaps, options, futures, and options on futures.

The pricing of each of these is based on the spot price. But there are some differences in the pricing, and the instruments are weighted differently, because some of them have more or less sensitivity to the spot price, which is the price that plaintiffs allege was manipulated.

So the notional volume times the conversion ratio,

which you see in the right-hand column, the multiplication of those two factors puts all the instruments into a spot equivalent volume, and we call this the settlement transaction volume. And on the next slide, we have an example of that calculation.

The top example is a spot trade for \$25 million USD.

The spot has a 1.0 conversion ratio. So the settlement transaction volume for that trade would be 25 million.

If we just go down to the third example there for options, we have an example of a \$40 million USD over-the-counter traded option. The conversion ratio for options is .2. So the settlement transaction volume is 8 million.

Then on the next slide, after settlement transaction volume is determined, the next step is to adjust that volume according to currency pair and trade size. And this step of the formula we call the relative damage factors.

So as you can see from the table, less liquid currency pairs are assigned a greater weighting in the formula than more liquid currency pairs, and that's because they are more susceptible to price movements than more liquid currency pairs.

Similarly, large trades are assigned a greater weighting than small trades because they are also more susceptible to price movement than smaller trades.

In addition, the chat evidence, as far as we have

reviewed so far, shows that the defendants targeted the larger trades.

THE COURT: How do you actually review the chat evidence and keep track of it?

MS. ANDERSON: The chat evidence was produced by the defendants and we put it into a document review software, and we have different coding forms set up for different types of evidence that we are looking for.

So we have attorneys who review the chat evidence and mark it for types of trades and types of conversations that we are looking for. And we review the evidence and we share the evidence with our experts who assist us in helping us understand what is being said. That's how we take it into account in the plan of distribution.

THE COURT: OK.

MS. ANDERSON: On the next slide, the final factor that the plan of distribution takes into account are legal discounts. And this is, I would say, the main revision to the plan of distribution since the last time we presented it.

So there are two types of legal discounts. There is a discount for time period and there is a discount for exchange geography. And these discounts are based largely on the September 20, 2016 opinion on the motion to dismiss, as well as ongoing review of the discovery record and analysis of the transaction data.

So taking the time period discount first, trades made between January 1, 2003 and November 30, 2007 are discounted by 40 percent. And claims made based on trades during this time period were dismissed for failure to state a claim in the Court's order.

The discount is also reflective of our review of the discovery record. We found that chat technology that was used in the now litigation period, that type of chat technology would be introduced in the early class period years. So the evidentiary record with respect to chats for this time period is not as strong as the non-discounted time period, which is the second line there, December 1, 2007 through December 31, 2013.

Then we have a second discount time period for trades made between January 1, 2014 and December 15, 2015. And these trades are discounted by 90 percent. This discount is also based on the strength of the evidentiary record with respect to the chat evidence. After the existence of the DOJ's investigation and other regulatory investigations were made public in 2003, and also some dismissals and suspensions of some of the traders, we see in the evidence that the interbank chat room conversations about price are beginning to dissipate during this period.

So we weighted the middle period to account for the fact that the middle period claims are more likely to succeed

than the claims during the two discounted time periods.

THE COURT: OK.

MS. ANDERSON: Then on the next slide, we have the legal discount for exchange location. So in the September 20, 2016 opinion, there was a small segment of trades dismissed as outside of the reach of the Sherman Act and Commodities Exchange Act. And those trades are trades by U.S. domiciled class members when the exchange is located outside of the United States. So we have discounted those trades by 75 percent to account for the dismissal.

The impact of this discount is going to be very small because the exchange trades, they are already a small percentage of the overall FX market. We estimate less than 5 percent. And the vast majority of the exchange trades occur on the CME and on ICE, which are located in the United States. So it's only a few exotic currency pairs that might be traded in local exchanges outside of the United States. So we are talking about a small fraction of a small percent of impacted trades by this discount.

THE COURT: OK.

MS. ANDERSON: Then on the next slide, we have a simplified example calculation of the plan of distribution formula. So we will see how the plan of distribution takes into account the five factors that we discussed: Notional amount, instrument type, currency pair, trade size, and legal

discount. The outcome of this formula, we call that the eligible participation amount. And these calculations are going to be performed for each claimant on a trade-by-trade basis, but it's all done through formulas in databases.

So the example trade here, we have an \$8 million spot trade USD against the Hungarian Forint, and the trade occurred in 2006. So the spot trades get a 1.0 conversion ratio. So 8 million times 1.0 is \$8 million in settlement transaction volume.

So next we apply the relevant damage factors that take into account currency pair and trade size. The USD/Hungarian Forint is an illiquid currency pair, and the \$8 million trade size falls within one of the middle buckets of trade size back on the slide we had, slide 7, with the relative damage factors. So if you go to slide 7 and look at the table, the relative damage factor for a trade like this will be 4.0.

So we take the \$8 million times 4.0 to give us 32 million. Then we apply the legal discount because the trade occurred in 2006. So we times 32 by .6, and we get an eligible participation amount on this trade of 19.2 million.

Then on the next slide, we have a list of payment categories. The payment categories are also going to be a review of our last presentation, but we have updated the payment amounts for de minimis and automatic payment based on transaction data review.

So the de minimis payment is 15 and the automatic will be 150. And these types of payments are intended to preserve the settlement fund against administration costs.

THE COURT: Are there a lot of trades in that size?

MS. ANDERSON: We estimate it will be, roughly, 40 to
50 percent of the claims that fall within one of those two
categories.

THE COURT: OK.

MS. ANDERSON: If the payment exceeds 150, then the claimant will be paid a pro rata share of the settlement fund based on its eligible participation amount compared to the overall total eligible participation amount from authorized claimants.

THE COURT: OK.

MS. ANDERSON: Then on the last slide, slide 12, we have an outline of the timing of communications with claimants.

So notice will commence on October 1st, class members will begin receiving their claim forms in their notice packets. And when claim forms start to come back to the claims administrator, the claims administrator is going to immediately provide them with an acknowledgement of receipt of their claim. And we have the deadline to file claims proposed as March 22, 2018.

Then on April 1st, the claims administrator will begin distributing what we call claim assessment notifications.

These are really reports that are going back to the claimant to provide them information about their claims so that they can decide whether or not they want to switch to the other type of claim. So this report is going to tell the class member their payment resolution category — de minimis, automatic or pro rata. It will provide them with calculations of their settlement transaction volume and their eligible participation amount. And they will get a file of their transactions and instructions on how to convert to the other option and the timing for doing that should they decide to do so.

THE COURT: OK.

MS. ANDERSON: That's the end of the presentation on the plan of distribution.

THE COURT: Thank you.

So the schedule seems fine to me. I am going to schedule the final fairness hearing for May 23rd at 4 p.m. And I plan to approve all of the motions that are before me. I appreciate the proposed orders that you have submitted to me.

I was wondering if I could trouble you for a red-line comparing my prior preliminary order and your proposed preliminary order as well as my prior order approving the notice and plan of distribution and the current one. I think that I had sent you both in Word format, but if not, you can e-mail my chambers and I am happy to supply them.

MR. BURKE: We will do so, your Honor.

THE COURT: Thank you.

I know we are here for the preliminary approval hearing on the settlements. I know there are two defendants who haven't settled. Do you want to update me on the status of the litigation, but we don't need to go into the whole Department of Justice dispute, which I have many submissions on.

MR. BURKE: I'd be happy to, your Honor. Thank you.

We are proceeding in the normal course of discovery

against now, I believe, just one nonsettling defendant. There

THE COURT: So does that mean 30(b)(6) depositions?

MR. BURKE: We have a 30(b)(6) deposition coming up on corporate organizational structure, but nothing that is touching the actual substance of the litigation at this point until we get things resolved at the Department of Justice.

THE COURT: OK.

is one holdout left.

MR. BURKE: With respect to the other bank, who I believe we reached terms with, we hope to be able to get another motion for preliminary approval to the Court by the middle of this month. And we are working with them on what is necessary in terms of data and names and addresses so as to effect notice on the same schedule as everyone else.

THE COURT: Thank you.

I am trying to think of the most efficient way for you

to present that information to me, because I presume, for example, your memo of law will largely repeat a lot of what is in the memo of law that you have already given me but with perhaps a few different facts.

MR. BURKE: Yes, your Honor. The primary difference is going to be the amount of monetary compensation. But the release will be the same -- everything else that we are seeking will be essentially the same except for the monetary.

THE COURT: If you could just make that clear in your papers so that I can deal with it expeditiously, and I will deal with it as soon as I get it.

MR. BURKE: Yes, your Honor.

THE COURT: We, of course, will have to leave some time for objections, but I think ten days should be fine.

MR. BURKE: Yes, your Honor.

THE COURT: Although ten days won't work if notice is going out October 1 and you're getting it to me mid-month.

MR. BURKE: We will work with the other party to get it to you as quickly as possible, and we are on a separate track working with them to get the information we need so that the notice can go to the printer with the expectation that they will be part of this group.

THE COURT: Thank you. Anything else?

MR. BURKE: No, your Honor. Thank you.

THE COURT: We are adjourned.